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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 492

MARIKO KUNIYUKI, *Petitioner*

v.

DEAN ACHESON, as Secretary of State of the United States of America

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 130-137) is reported at 189 F. 2d 741. The opinion on rehearing (R. 140-141) is reported at 190 F. 2d 897. The opinion of the District Court (R. 8-25) is reported at 94 F. Supp. 358. The findings of fact and conclusions of law of the District Court appear at R. 28-44.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1951 (R. 138). A petition for rehearing was denied on July 27, 1951 (R. 139). By order dated October 16, 1951, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including December 24, 1951 (R. 143), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, within the meaning and intent of Section 401(e) of the Nationality Act of 1940, providing for loss of United States nationality by voting in a political election in a foreign state, Japan was a foreign state in 1946 and 1947.

2. Whether, within the meaning and intent of Section 401(e) of the Nationality Act of 1940, elections held in Japan in 1946 and 1947 under orders and at the instance of General Douglas MacArthur, Supreme Commander for the Allied Powers, were political elections.

3. Whether the expatriation provision of Section 401(e) is inapplicable in view of the official encouragement of the election by United States occupation officials, and the fact that petitioner, in voting, desired to carry out the objectives of the United States in Japan.

4. Whether Section 401(e) of the Nationality Act of 1940 is constitutional.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * *.

Section 401(e) of the Nationality Act of 1940, 54 Stat. 1168-1169, 8 U.S.C. 801(e) provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *.

STATEMENT

Petitioner was born in Seattle, Washington, in 1916 (R. 49) of Japanese parents. When she was three years old, she was taken by her parents to Japan (R. 54). Her parents returned to the United States after seven months (R. 54), and left petitioner with relatives so that she might be edu-

cated in Japan (R. 55). Petitioner did not thereafter come to the United States until 1940 (R. 56), when she came here for a period of eight months. Her testimony was that when she came here in 1940, she intended to remain here permanently (R. 57), and that her return to Japan in the summer of 1941 was to make one last visit to her aunt "prior to permanently settling in the United States" (R. 74). After a few months in Japan, petitioner "decided to return to my home in Seattle but was not permitted to do so as Japan was controlled by militarists. Thus, I was detained in Japan throughout the war" (R. 74).

The petitioner voted in six Japanese elections, including the general elections of April 1946 and April 1947 (R. 30). As a result, the United States consulate determined that petitioner had expatriated herself and refused to register her as a national of the United States (R. 4, 6, 130-131) or to issue her a passport (R. 30). Petitioner thereupon caused this action to be commenced in the United States (R. 3).

Petitioner was the only witness in her own behalf and she frankly admitted voting in the Japanese elections of 1946 and 1947 (R. 67-69). She testified:

> After the war ended, General MacArthur and the occupational forces had granted the women in Japan for voting; and to vote I thought it would help the cause of democracy

> in Japan. It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote. [R. 70.]

In a statement given to the American Consul in Japan, she said (R. 74-75):

> After the termination of war, here, in Japan, there came into effect the Women's Suffrage through which the women were given the chance to participate in the democratic future of Japan and, at the time of the elections, I constantly read much in the newspapers and other publications in addition to election guidance programs over the radio, that were sponsored by the Central Government of Japan and Occupational Authorities from the offices of the Supreme Commander, Eighth Army, and Military Governments, that it was absolutely essential that every woman of voting age in Japan should turn out at the pools (sic) thereby positively asserting themselves as voters and exponents of democracy. So I, in total ignorance of the existence of the Nationality Act, but with a view toward exercising my ideas with respect to democratic practices, voted in the same way as the Japanese women citizens, not realizing for a moment that by so doing, I was in effect, relinquishing my American citizenship. It was only

through the so convincing approach of occupation force voting drives and no talk of we few "orphan Americans" or instructions to us, that prompted me to participate in the great democratic spirit which engulfed everyone at the time.

On cross-examination, the following occurred (R. 93):

Did you hear the appeal that was made by radio to vote? A. (Through the interpreter): Yes, by the radio and by the newspapers.

* *

Q. There was nothing said in any of that radio propaganda that you heard that appealed to Japanese of American birth to vote in those elections, was there? A. (Through the interpreter): No, I didn't hear anything like that.

Q. So that, at the time you voted, you did so as a Japanese citizen, did you not? A. (Through the interpreter): My parents were in America and I have American citizenship but, according to General MacArthur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote.

The Court: All Japanese?

The Witness (Through the interpreter): Everybody in Japan.

Similarly (R. 95):

> Q. In voting, you were interested in the welfare of Japan, were you not.
>
> A. (Through the interpreter): Since the occupational forces occupied Japan, I believe the voting concerned helping Japan. Therefore, my intention of voting at that time was to help the occupational forces.
>
> Q. Did you know that the occupational forces represented eleven nations? A. (Through the interpreter): I thought it was only America.

In addition, documentary evidence was introduced relating to the authority of the Supreme Commander of the Allied Powers, and the pressure—principally radio and newspaper releases—exerted to induce the Japanese people, and particularly Japanese women, to vote (R. 98-106).

The district court concluded that the elections in which petitioner voted were not political elections because they were subject to the approval of the Supreme Commander for the Allied Powers (R. 43, 41); that Japan was not a foreign state because its government was under the dominance of the conquering powers (R. 31-43); and that petitioner did not vote voluntarily (R. 30-31, 43), but rather that she was "induced so to vote by the United States Occupation Forces in Japan, and by the Headquarters of General Douglas MacArthur"

(R. 30); and that in so voting, she "in good faith believed that she was helping * * * to achieve United States objectives in Japan, by helping to democratize Japan." (R. 30-31.)

The district court also found that petitioner "did not know, and she had no reason to believe, that her voting would result in the loss of, or would in any manner affect her United States citizenship"; and that in voting "she had no intention to, or desire to affect her allegiance to the United States, or to shift her allegiance from the United States to Japan." (R. 31.)

The Court of Appeals reversed (R. 130-137). It concluded that Japan was a foreign state within the meaning of Section 401(e), and that the elections were "political." It further concluded that the District Court's finding that petitioner did not vote voluntarily was clearly erroneous.

ARGUMENT

1. The district court conceded, as petitioner must, that whether Japan, in 1946 and 1947 was "a foreign state or not, it nevertheless was foreign" (R. 9). When, as here, it was not the intention of the conquerors "that the Japanese shall be enslaved as a race or destroyed as a nation"[1] Japan

[1] Potsdam Proclamation of July 26, 1945, reprinted in Plaintiff's Exhibit 2, *Occupation of Japan, Policy and Progress*, Department of State Publication 2671, Far Eastern Series 17, pp. 53-55. This declaration also recited that "(12) The occupying forces of the Allies shall be withdrawn from

remained "foreign" during the period of occupation. *Neely* v. *Henkel* (*No. 1*), 180 U.S. 109, 115-121. That is even more clearly true in the case of Japan than it was with respect to Cuba (whose status was involved in *Neely* v. *Henkel*), for General MacArthur acted "as the agent of the Allied Powers", not solely on behalf of the United States. *Hirota* v. *MacArthur,* 338 U.S. 197, 198.

That Japan remained a foreign "state" within the meaning of Section 401(e) of the Nationality Act of 1940 is hardly less clear. Military occupation of a country does not in itself terminate the life of a country as a separate entity. 1 Hackworth, *Digest of International Law* (1940), Sec. 25, p. 127; Hyde, *International Law* (2nd rev. ed. 1945), Sec. 7, pp. 22-23. However complete the occupation control over Japan, it was never intended to destroy Japan as a separate unit; the aim of the occupation of Japan was its rehabilitation. As Judge Yankwich pointed out in an opinion dealing fully with this question, "in the accepted popular sense, which also has sanction in international law, [occupied Japan] has a *distinct being*, separate and apart from the occupying powers, and capable of commanding allegiance which is incompatible with American nationality. Because of

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Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government."

such incompatibility, the Congress must have considered it in this sense,—when it designated participation by an American national in a political election in a 'foreign state' as one of the means of losing his American nationality." *Uyeno* v. *Acheson,* 96 F. Supp. 510, 515 (W.D. Wash.).

Moreover, there is real question whether petitioner's contention that Japan was not a "state" is justiciable at all.[2] This Court has long recognized that "Who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Jones* v. *United States,* 137 U.S. 202, 212, and cases there cited; *Pearcy* v. *Stranahan,* 205 U.S. 257, 265; *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 380; *Williams* v. *Suffolk Ins. Co.,* 13 Pet. 415; cf. *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 319-322. Hence, it may very well be conclusive here that the Department of State deems occupied Japan to be a "foreign state".[3]

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[2] It is not clear whether petitioner asserts any more than that Japan had no "independent sovereignty" (Pet. 21). Even if it did not, as already pointed out, the Allied Powers and not the United States were sovereign so that, in any event, Japan was a "foreign state".

[3] "On the specific question of whether or not Japan is a foreign state, it is the Department's view that the interna-

2. Petitioner argues (Pet. 15-19) that the elections in which she voted were not "political elections" but merely public opinion polls in that they were subject to the control of the Supreme Commander for the Allied Powers who had announced that he would set them aside if the outcome would interfere with occupation objectives. It is clear, however, that the whole purpose of the elections was to activate the political life of Japan; to have the Japanese people express their views on political matters. The elections were thus clearly political for the purposes of Section 401(e) of the Nationality Act.

The restrictions which were imposed on the Japanese electorate did not foreclose choice nor make their votes merely expressions of desire. See *Kuwahara* v. *Acheson*, 96 F. Supp. 38, 42 (S.D. Cal.). The election of 1946 was a general election of representatives one of whose functions was to be the consideration of a Japanese Constitution. *Political Reorientation of Japan*, p. 315 (lodged with the Clerk of this Court, see Pet. 15, Note 4). The 1947 elections were respectively (1) to choose

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tional personality or statehood of Japan did not cease as a result of the allied military occupation." Letter dated June 3, 1949, from the Acting Legal Adviser, for the Acting Secretary of State, to the Attorney General. The district court refused to receive this letter in evidence but invited the Government to bring it to his attention on brief (R. 114). This Court has noticed similar letters. See, e.g., *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380.

all executives, governors, mayors and village and town headmen (April 5), (2) a run-off necessitated by voting in the April 5 election (April 15); (3) to choose the House of Councillors, some chosen from prefectures and some chosen at large (April 20); (4) to choose the House of Representatives (April 25); and (5) to choose assemblymen of prefectures, cities, towns and villages. *Political Reorientation of Japan,* p. 321.

All these elections clearly involve participation in the political affairs of Japan. Domestic administration of Japan was left in Japanese hands.[4] And although the Supreme Commander had indicated that he would, if necessary, exercise power to rescind the 1946 election, it would have been necessary to dissolve the Diet, or representative body, to do so.[5] Indeed, the very document which

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[4] See Plaintiff's Exhibit 2, *Occupation of Japan, Policy and Progress,* Department of State Publication 2671, Far Eastern Series 17, *United States Initial Post-Surrender Policy for Japan,* August 29, 1945, p. 75: "The Japanese Government will be permitted, under * * * instructions [of the Supreme Commander] to exercise the normal powers of government in matters of domestic administration * * * subject to the right and duty of the Supreme Commander to require changes in * * * machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms."

[5] See Plaintiff's Exhibit 2, *supra,* Appendix 29, *Reply by General MacArthur to Far Eastern Commission on Timing of Elections,* March 29, 1946, p. 139; "Should the results of the election prove disadvantageous to the purposes of the

asserts the power to nullify the results of the election points out the imperative need for a responsible and representative voice of the will of the Japanese people. The Supreme Commander stated:

> The basis of occupational policy is the utilization of the Japanese Government to the fullest extent, under SCAP supervision and control. This is only possible through a functioning legislative body to enact new laws required to implement SCAP directives and to provide for routine governmental business. The alternative is government by Imperial Edict which denies to the Japanese People the right to participate in their own domestic affairs. * * * It is imperative that a more representative body [than the present Diet] be organized at the earliest possible date. The urgent requirements of the present situation demand an expression of popular will. The results of the election will serve to define more clearly the political picture, to clarify

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occupation, the remedy is always in my power to require the dissolution of the Diet and the holding of a new election under such provisions as are deemed necessary."

The record does not show that this statement was made in connection with any of the 1947 elections. Consequently, in an opinion by Judge Yankwich, it was held that whatever might be said of the April 1946 election, the 1947 elections were political elections. *Uyeno* v. *Acheson*, 96 F. Supp. 510, 516-517 (W.D. Wash.).

> political issues and political parties and to indicate the nature and trend of popular opinion. It will also provide for popular participation in the determination of major questions.[6]

The theory underlying Section 401(e) is that voting in a foreign state is the kind of association with another nation's political affairs which is inconsistent with American citizenship. The committee which drafted the Nationality Act of 1940[7] explained its purpose thus:

> The meaning of this subsection also seems clear. It is applicable to any case of an American who votes in a political election in a foreign state, whether or not he is a national thereof. Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the

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[6] Plaintiff's Exhibit 2, *supra, Reply by General MacArthur to Far Eastern Commission on Timing of Elections,* March 29, 1946, at p. 138.

[7] The Act was drafted by a Committee of advisors appointed by the Secretaries of State and Labor and the Attorney General. Its report to the President was submitted to Congress. Hearings before Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 405, 490-491.

> nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.

The carrying out of such a purpose does not depend on a judgment as to the political effectiveness of the vote in a particular foreign state. The Congress of 1940 cannot have been unaware of the perfunctory referenda that passed as elections in much of Europe at that time. It cannot be seriously supposed that one who participated in as much political determinateness as was left to any of the people of Hitler's Germany, for example, would be permitted to claim that the power of the real governing body to ignore the vote prevented expatriation.

3. Petitioner's contention that her voting was involuntary (Pet. 27-42) is answered by her own testimony. It is clear that she was subject to no duress, no threat of being thrown into a wartime concentration camp or of being denied food rations, as is true of most of the cases on which she relies.[8] All that happened was that petitioner con-

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[8] *Doreau* v. *Marshall*, 170 F. 2d 721 (C.A. 3); *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C.A. 1); *Tsunashima* v. *Acheson*, 83 F. Supp. 473 (S.D. Cal.); *Ouye* v. *Acheson*, 91 F. Supp. 129

sidered herself sufficiently Japanese to assume that propaganda encouraging the Japanese to vote applied to her. This was not surprising in view of the fact that, in 1947, she had spent all but 3 years and 8 months of her 31 years in Japan. There is no contention that the propaganda was directed to the Japanese Nisei; it was directed to the Japanese to encourage them to assert their Japanese political rights. No one who did not have a sense of being tied to Japan would regard the releases and comments about the assertion of Japanese rights as applying to his situation.

All that petitioner showed was that she did not know of the provisions of Section 401(e) of the Nationality Act. But that is precisely the one consideration which under the decisions of this Court is irrelevant. *MacKenzie* v. *Hare*, 239 U.S. 299, and *Savorgnan* v. *United States*, 338 U.S. 491, together make it clear that a citizen's ignorance of the fact that his voluntary act will cost him his citizenship is not determinative.[9] The District

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(D. Haw.); *Yamamoto* v. *Acheson*, 93 F. Supp. 346 (D. Ariz.); *Seki* v. *Acheson*, 94 F. Supp. 438 (S.D. Cal.); *Rokui* v. *Acheson*, 94 F. Supp. 439 (S.D. Cal.); *Uyeno* v. *Acheson*, 96 F. Supp. 510 (W.D. Wash.).

[9] *Moser* v. *United States*, 341 U.S. 41, upon which petitioner relies, involved the quite different provisions of Section 3(a) of the Selective Training and Service Act of 1940, as amended, and a very different factual situation. There, government agencies as well as Moser were unclear as to the effect a claim of exemption would have on his right to citizenship and, in-

Court's finding that petitioner's act was involuntary did not involve the resolution of any disputed question of fact: it was a legal conclusion on the basis of petitioner's testimony and the documentary exhibits. Since, as we have shown, this very evidence establishes that petitioner's acts in voting were voluntary, the Court of Appeals properly set aside such findings as clearly erroneous.

The legislative history of Section 401(e) which we have cited, *supra,* pp. 14-15, is, we think a sufficient answer to petitioner's additional suggestion that the Section has no application here because she voted out of her desire to forward United States objectives. For the draftsmen of the Nationality Act asserted first that participation in the political affairs of another country is inconsistent with continued American allegiance. But they went beyond that and said, "in any event, it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality." Thus, it was not the Congressional purpose to make expatriation depend on whether it appeared that the act of voting in fact

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deed, Moser was specifically advised, through the Swiss consulate, that he could claim exemption without being debarred. Here, as shown, *supra,* petitioner was not so misled. It was only under the Selective Service Act and in those special circumstances that this Court found an "intelligent election" between military service and debarment from citizenship to be required.

reflected a change of allegiance. It is obvious, moreover, that voting in a foreign election, even in these circumstances, is at least as suggestive of a shift of allegiance as merely marrying a foreign subject would, in many cases, be. Yet, marriage to a foreigner is an act which Congress also has validly ordained to be in itself and in all circumstances sufficient reason for expatriation. *MacKenzie* v. *Hare,* 239 U.S. 299.

4. As the petitioner points out (Pet. 14), the constitutional question here presented was put before this Court, earlier this term, on the Government's direct appeals from judgments of invalidity of Section 401(e) and (c) of the Nationality Act of 1940. This Court, on January 2, 1952, vacated those judgments and remanded the causes for specific findings as to the circumstances attending the voting and army service of the appellees in those cases. *Acheson* v. *Okimura,* No. 421, this Term; *Acheson* v. *Murata,* No. 422, this Term. For the reasons stated in the Statement as to Jurisdiction filed in No. 421, and the Memorandum for Appellant in Opposition to Appellees' Motions to Dismiss or Affirm, in Nos. 421 and 422, the Government believes that the petitioner's attack on the constitutionality of Section 401(e) must fail.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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